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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE MAY DEPARTMENT STORES COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–12a) is reported at 454 F. 2d 148. The Board's decision and order (App. C, *infra*, pp. 28a–40a) are reported at 186 NLRB No. 17; the decision of the Regional Director in the related representation case (App C, *infra*, pp. 15a–27a) is not officially reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 13a) was entered on January 20, 1972. The Board's petition for rehearing was denied on March

20, 1972 (App. B, *infra, p.* 14a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 9(c)(5) of the National Labor Relations Act provides that, in determining whether "a unit [of employees] is appropriate" for collective bargaining purposes, "the extent to which the employees have organized shall not be controlling." The question is whether, where the National Labor Relations Board has determined without regard to the extent of union organization that either of two groups of employees would be an appropriate bargaining unit, that Section prohibits the Board from selecting the unit requested by the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in App. D, *infra,* pp. 41a–43a.

STATEMENT

A. THE BOARD PROCEEDINGS

On November 8, 1969, the Union[1] filed a petition with the Board's Regional Director for a representation election among the employees in a bargaining unit described as: "All warehouse employees employed at the Employer's Service Building in Los Angeles, California." The petition specifically excluded workroom employees employed at the service facility. (R.

[1] Local 196, New Furniture and Appliance Drivers, Warehousemen and Helpers, International Brotherhood of Teamsters.

10.)[2] The Director ordered a hearing, at which the following facts were established:

The employer, The May Department Stores Company ("the Company"), operates 17 retail stores in the Los Angeles, California, area. The "Service Building" is the warehouse or service facility of the Company's Los Angeles operations; it consists of 5 adjacent buildings geographically separate from the Company's 17 retail stores. (App. C, *infra*, p. 16a; Tr. 11–12.) Such traditional warehouse tasks as receiving, checking, marking, distributing, and shipping inventory are performed at the service facility. In addition, it has several workrooms for assembling, repairing, and reupholstering furniture, preparing custom draperies and carpets, altering men's clothing, storing furs, and making candy. (App. C, *infra*, pp. 18a–20a; Tr. 12, 66–161.) As noted, the Union's petition specifically excluded these workroom employees (R. 10).

The employees at the service facility have never bargained collectively. About two years earlier, however, another union (Teamsters Local 986) had filed a petition with the Regional Director for an election in a unit consisting of both the warehouse and workroom employees. In an election held in that unit, a majority of the employees voting rejected the union (App. C, *infra*, p. 21a; Tr. 8–9).

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[2] "R." refers to the formal documents reproduced in "Volume I, Pleadings," and "Tr." and "Co.X" to portions of the stenographic transcript of the representation hearing and the exhibits introduced therein by the Company. A copy of these materials, which comprised the record in the court below, has been filed with the Clerk.

On the present petition the Regional Director held that a unit which included those employees at the service facility performing typical warehouse functions, but excluded the workroom employees, was appropriate for collective bargaining. He found that, while Andrew Briggs directed all of the Company's operations at the service facility, one of Briggs' assistants, Peter Sanchez, separately managed most of the workrooms and that the men who directly supervised those workrooms in turn reported to Sanchez. The record also disclosed that all the workrooms, except that for furniture processing, were located together on the fifth and sixth floors of the same building. (App. C, *infra,* pp. 17a; Tr. 183–185, 68–70, 108–109, 128, 136–137, 146–147, 160–161; Co. X 1 (p. 18).) The Regional Director further noted that workroom employees had skills and responsibilities different from typical warehouse functions (App. C, *infra,* p. 22a; Tr. 78, 160–161; Co. X 1 (p. 19)), and that there was no interchange or transfer of employees between the service facility and the retail stores nor between the workrooms and the remainder of the warehouse facility (App. C, *infra,* p. 21a).[3]

The Regional Director rejected the Company's contention that the unit had to include the workroom employees since they were included in the unit found appropriate in the prior election case (App. C *infra,* pp. 21a–22a). He explained that, "although an overall

[3] Briggs was able to name only one employee, Carlos Conant, who had been transferred from his position as stockman and trained on the job to finish furniture (Tr. 290–291).

unit may be appropriate in the instant case, it is not the only appropriate unit, inasmuch as * * * workroom employees do not perform typically warehouse functions and inasmuch as the Board has held that units of warehouse employees excluding those working in the workrooms are appropriate." He pointed out that the Board had found a unit of employees performing typical warehouse functions to be appropriate in *A. Harris & Co.*, 116 NLRB 1628, *Associated Dry Goods Corp.*, 117 NLRB 1069, and *May Dept. Stores Co., d/b/a Famous-Barr Co.*, 153 NLRB 341; and that in those decisions it had excluded employees in upholstery, drapery, carpet, furniture, and fur storage workrooms from the warehouse unit.

The Regional Director concluded that the Board had not departed from this view in *H. P. Wasson & Co.*, 153 NLRB 1499, *May Dept. Stores Co., d/b/a Famous-Barr Co.*, 176 NLRB No. 14, and *R. H. Macy Co.*, 180 NLRB 470, where it had found a combined unit of warehouse and workroom employees to be appropriate. As the Regional Director noted, the Board had stated in those cases that " 'it is well settled that there may be more than one way in which employees may be grouped for purposes of collective bargaining. The fact that a given group of employees may have an indentifiable community of interests separate and distinct from other employees of an employer does not mean that the various groups of employees do not also have a larger common community of interests.' " (App. C., *infra*, p. 22a.) More-

over, the Regional Director noted that, in each of those cases, "the petitioner sought a unit which included the workroom employees." (App. C, *infra*, p. 22a.)

The Union won the representation election conducted by the Board among the warehouse employees and was certified as their exclusive bargaining agent (App. C., *infra*, p. 28a). The Company refused to bargain with the Union, an unfair labor practice proceeding ensued, and the Board found that the Company had violated Section 8(a)(5) and (1) of the Act. The Board ordered the Company to bargain with the Union upon request. (App. C, *infra*, pp. 37a–38a).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals (with one judge dissenting) declined to enforce the Board's order. The court stated (App. A, *infra*, pp. 7a–8a):

> A careful reading of the "Decision and Direction of Election" of the regional director, affirmed by the board, is conclusive of the proposition that the only attempted explanation of the departure from the holdings in the *Wasson, Famous Barr,* and *Macy* decisions is contained in one sentence:
>
> "Thus, in each of these cases, the petitioner [union] sought a unit which included the workroom employees."
>
> It is inescapable that the Board was saying, in effect: In the *Wasson, Famous Barr* and *Macy* cases the petitioning unions wanted the workroom employees included in the bargaining unit, so the board included them; but in the instant case, the petitioning [union] wanted

the workroom employees excluded from the unit, so the board excluded them.

Giving the petitioning union precisely what it wants just because it asked for it is the same as giving controlling weight to the extent the union has organized a group of employees * * *. [T]his is prohibited by Section 9(c)(5) of the Act. * * *

REASONS FOR GRANTING THE WRIT

The court of appeals held that Section 9(c)(5) of the National Labor Relations Act prohibits the Board, in choosing between two units for collective bargaining purposes, each of which would be appropriate without regard to the extent of union organization, from selecting the unit requested by the union. This holding conflicts with the decision of the Court of Appeals for the Third Circuit in *National Labor Relations Board* v. *Puritan Sportswear Corp.*, 385 F.2d 142; rests upon a misconception of the purpose of that Section; and is inconsistent with the Board's statutory duty "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act" (Section 9(b)).

1. In *Puritan Sportswear,* the court upheld the Board's selection of separate units for (a) production and maintenance and (b) shipping and warehouse employees, even though three years earlier, at the request of the same union, it had found appropriate a unit comprising both groups of employees and "[t]here had been no substantial change in the nature or organization of work at the employer's plants dur-

ing the interval between elections" (385 F. 2d at 143). There, as here, the employees in the larger unit had rejected the union. The court said (385 F. 2d at 143):

> It is not decisive that in the first representation proceeding an overall single unit had been found appropriate, while three years later a division of the work force into two units was found appropriate. * * * [T]he approval of separate units did not offend section 9(c)(5) of the Act because relevant and significant factors in addition to "the extent to which the employees have organized" underlay and supported the Board's decision.[4]

In the present case, on the other hand, the Ninth Circuit held that, "[g]iving the petitioning union precisely what it wants just because it asked for it is the same as giving controlling weight to the extent the union has organized a group of employees" in violation of Section 9(c)(5). In this case, as in *Puritan Sportswear,* "relevant and significant factors in addition to 'the extent to which the employees have organized' underlay and supported the Board's decision" (see *supra,* pp. 3–6), but the Ninth Circuit, unlike the Fourth, did not deem this consideration adequate to sustain the Board's unit determination. The Ninth Circuit thus has held that Section 9(c)(5) invalidates

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[4] See also, *National Labor Relations Board* v. *Morganton Full Fashioned Hosiery Co.*, 241 F. 2d 913, in which the Fourth Circuit held that Section 9(c)(5) did not preclude the Board's establishment of a separate unit of knitters, notwithstanding that another union had earlier been certified in a plant-wide unit which included the knitters.

a Board unit determination that the Third Circuit would have upheld as consistent with that Section.

2. Section 9(b) of the Act requires the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." Section 9(c)(5) provides that

> In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Section 9(c)(5), which was added by the 1947 Taft-Hartley amendments, was intended to serve the limited purpose of "overrul[ing] Board decisions where the unit determined could only be supported on the basis of the extent of organization * * *" (*National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 441). As Senator Taft explained, the Board had used "[t]he extent-of-organization theory" of unit determination "where all valid tests fail to give the union what it desires and represents a surrender by the Board of its duty to determine appropriate units * * *" (93 Cong. Rec. 6860). "Subsection 9(c)(5) adopts the House amendment written to discourage the Board from finding a bargaining unit to be appropriate even though such unit was only a fragment of what would ordinarily be deemed appropriate, simply on the extent of organization theory" (93 Cong. Rec. 6444).

The provision, however, "was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination" (*National Labor Relations Board* v. *Metropolitan Life Insurance Co., supra,* 380 U.S. at 442). It merely prohibits the Board from selecting an otherwise *inappropriate* unit solely on the basis of a union's request that it be designated. It does not, however, prohibit the Board, where either of two units would be appropriate without regard to the extent of organization, from selecting the unit requested by the union.

The Board, of course, "is not required * * * to choose the most appropriate unit, but only to choose an appropriate unit within the range of several appropriate units in a given factual situation" (*State Farm Mutual Insurance Co.* v. *National Labor Relations Board,* 411 F. 2d 356, 358 (C.A. 7), certiorari denied, 396 U.S. 832).[5] In the present case, the Board was fully justified in selecting the unit consisting of only the warehouse employees and not those in the workrooms.

The warehouse employees performed functions which were distinct from and not as highly skilled as those performed by the workroom employees, there was separate immediate supervision of the two groups of employees, they worked in separate areas of the service facility, and there was no transfer of employ-

[5] See also, *National Labor Relations Board* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690, 693 (C.A. 4); *National Labor Relations Board* v. *Lou De Young's Market Basket*, 406 F. 2d 17, 24 (C.A. 6), remanded on other grounds, 395 U.S. 828.

ees between the groups (*supra*, p. 4). These factors justified according the warehouse employees separate representation.[6] Apart from their separate interests, however, the warehouse employees also had an interest in common with the workroom employees. They worked at the same facility, which is geographically separate from the Company's retail operations; they came into frequent contact with the workroom employees; and the service facility was under the general supervision of the same individual (*supra*, pp. 3–4). Thus, a combined unit of warehouse and workroom employees also would have been appropriate,[7] as the Board had previously held.

3. In these circumstances, the Board's selection of the unit requested by the union is fully consistent with and furthers the Board's statutory obligation, under Section 9(b) of the Act, "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act" (*supra*, p. 9). It would be contrary to this statutory policy to compel employees in an otherwise appropriate unit who wish the union to represent them in that unit to forego representation unless and until the union could organize the additional employees in a broader unit. Moreover, since a union which is selected as exclusive bargaining representative is required to represent fairly all of the employees in the unit whether or not they are members of the union, there is no reason to compel the union to add

[6] See, *e.g.*, *A. Harris & Co.*, 116 NLRB 1628.

[7] See, *e.g.*, *May Dept. Stores Co. d/b/a Famous-Barr Co.*, 176 NLRB No. 14.

to an otherwise appropriate unit employees whom they may not wish to represent, or who [redacted] may not want it.[8]

4. The question whether Section 9(c)(5) prohibits the Board, in choosing between units, each of which would be appropriate without regard to the extent of union organization, from selecting the unit requested by the union is an important one in the administration of the Act. A substantial number of Board unit determinations are made in situations where unions request a unit which groups employees of the employer differently than the unit the Board previously had

[8] The situation here is distinguishable from that in *National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438. There the Court found that the Board had not adequately articulated its reasons for departing from its 15-year policy of declining to establish other than state-wide or company-wide bargaining units of insurance agents. Here, as shown by the dissenting judge (App. A, *infra*, pp. 8a–12a), the Regional Director fully explained the basis for his decision and for distinguishing the cases in which the Board had established broader units. The court of appeals' conclusion that this explanation was inadequate stemmed from its erroneous interpretation of Section 9(c)(5).

Similarly distinguishable are the three *Sears* decisions which the court of appeals cited (App. A, *infra*, p. 7a). In those cases, the Board did not establish separate warehouse units because each warehouse operation was "so closely integrated with the store's retail operation as to render it unlike the traditional warehousing unit contemplated [in *A. Harris*, *supra*]." *Sears Roebuck & Co.*, 191 NLRB No. 84, p. 22. The distinguishing factors present in those cases were the small size and geographic proximity of the employer's entire operation, the high degree of interchange of all employees at the facility, and the close, constant contact among all the employees, including the regular performance of each other's duties. None of those factors is present here.

selected and in which an election had been lost. The decision of the court of appeals overturns the Board's settled interpretation that in that situation Section 9(c)(5) does not preclude it from selecting the unit the union has requested, if it is otherwise appropriate. More significantly, in initial attempts to organize employees in companies whose organizational structure is similiar to that of a company where previous representation efforts have been made, the decision indicates that the Board could not certify a unit which is appropriate independent of the extent of organization, if it has previously designated a different unit as appropriate in a similarly structured company. This holding, if allowed to stand, is therefore almost certain to produce a substantial number of challenges to Board unit determinations and additional litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1972.

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 26,790

The May Department Stores Company,
Plaintiff-Appellant,

vs.

National Labor Relations Board,
Defendant-Appellee.

[January 20, 1972]

On Petition to Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before: WRIGHT and TRASK, Circuit Judges, and BYRNE, District Judge.[1]

WRIGHT, Circuit Judge:

This case is before us on petition to review and cross-application for enforcement of an order of the National Labor Relations Board. This court has jurisdiction under Section 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. § 151, et seq.

[1] Honorable William M. Byrne, Sr., United States District Judge, for the Central District of California, sitting by designation.

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The board ordered an election among the employees at a service facility owned by the May Company in Los Angeles. At issue is the appropriateness of the bargaining unit certified by the board. The board's order appears at 186 NLRB No. 17 (1970).

Because the board gave controlling weight in determining the bargaining unit to the extent of unionization, in violation of Section 9(c)(5) of the Act; and because the board failed to distinguish its decision in this case from its many inconsistent decisions in cases involving substantially identical fact situations, we grant the petition to set aside the order and deny the cross-application for enforcement.

May Department Stores (Mays) operates a chain of department stores in Southern California—one major store in downtown Los Angeles, seventeen branch stores in that part of the state, and a service facility three miles from the downtown store.

The service facility is the subject of these proceedings. It consists of five buildings making up one complex serving the retail stores. Goods are received, warehoused, and distributed. There are also processing activities in a variety of workrooms handling furniture, drapery, upholstery, carpeting, clothing alterations, etc. The workrooms are on several floors of the buildings comprising the facility, adjacent to merchandise storage and warehousing areas.

The board has certified a unit of "warehouse employees," essentially those personnel who check merchandise in and out and move it around the facility. Excluded are the workroom employees.

The history of attempts to unionize the service facility employees is brief. In May of 1967, Teamsters Local 986 filed a petition pursuant to Section 9(c) of

the Act, seeking a board election among employees at the facility. The union did not contest Mays' position that the unit should include all workroom employees. The regional director ruled that the unit appropriate for collective bargaining was that contended for by Mays and sought by the union, even though the alterations workroom employees to be included were then located outside the facility. The alterations workroom was transferred to the facility in September of 1967.

The representation proceeding initiated by Teamsters Local 986 ultimately culminated in an election. The union failed to receive a majority of the valid ballots cast and the results of the election were certified.

In November 1969, Teamsters Local 196 filed a second amended petition for election, seeking a bargaining unit to include warehouse employees but excluding the workroom employees. After a hearing, and over the protest of the company, the regional director certified the smaller unit now requested by the union.

An election was ordered in January 1970, for the unit as sought by the union and it received a majority of the valid ballots cast. The result of the election showed no overwhelming union sentiment even within the fragment unit, the union winning by the narrow margin of 72 to 65.

In order to secure judicial review, Mays refused to bargain with the union and the latter filed refusal to bargain charges. A complaint issued; Mays answered with an admission that it had refused to bargain, but pleaded affirmatively the inappropriateness of the bargaining unit. Upon motion of the General Counsel, summary judgment was granted and Mays held in violation for refusal to bargain with the union.

I. *Extent of Unionization*

In determining the appropriateness of the bargaining unit, the board has broad discretion. Section 9(b) of the Act provides:

> "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof."

This section has been interpreted to give the board wide latitude within its area of expertise. *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485 (1947); *N.L.R.B., v. E-Z Davies Chevrolet*, 395 F.2d 191 (9th Cir. 1968); *N.L.R.B. v. Merner Lumber & Hardware Co.*, 345 F.2d 770 (9th Cir. 1965), cert. denied, 382 U.S. 942 (1965).

However, the board is limited by Section 9(c)(5) of the Act which provides:

> "In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

We noted in *Westward-Ho Hotel Co. v. N.L.R.B.*, 437 F.2d 1110, 1112–13 (9th Cir. 1971):

> "[I]t is clear that Congress in passing this amendment intended to overrule Board decisions approving a unit that could only be supported on the basis of the extent of organization."

The legislative history of Section 9(c)(5) includes the following pertinent remarks:

> "[The section] strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. . . . While the Board may take into consideration the

> extent to which employees have organized, this evidence would have little weight, and as [the section] provides, is not to be controlling. . . ." 1 Legislative History of the Labor Management Relations Act, 1947, page 328; House Report No. 245, 80th Congress, 1st Session, page 37.

We agree that the compelling inference from the record before us is that the board allowed the extent of unionization to control its decision. Although we do not contest the board's counsel's general proposition that more than one unit may be appropriate at any facility [*See State Farm Mutual Automobile Insurance Co. v. N.L.R.B.*, 411 F.2d 356 (7th Cir. 1969), cert. denied 396 U.S. 832 (1969)], we are not convinced that merely because the board, at the urging of the union, has made two conflicting determinations this shows conclusively that there are two appropriate units in one facility.

There was no significant change between 1967 and 1970 at the Mays service facility. In view of the fact that the union sought a facility-wide unit, lost the election, and then sought a fragmented unit, we feel that it is incumbent upon the board at the very least to confront the inconsistency between its two rulings and give adequate reasons why it finds two different appropriate units within the same facility. Counsel's after-the-fact attempts to explain the record are inadequate.

II. *Inconsistency With Other Board Decisions.*

Of equal significance is the fact that the board's decision in the instant case was wholly inconsistent with its prior, and subsequent, decisions in cases involving retail department store service buildings under comparable facts. In *May Department Stores Company d/b/a Famous Barr Company*, 176 NLRB No.

14 (1969), the board held appropriate a bargaining unit which included all employees employed at the petitioner's St. Louis facility, including approximately 225 employees who performed traditional warehouse functions and approximately 90 who were employed in the furniture, carpet, appliance, and radio and television workrooms and in the fur storage vault.

In *R. H. Macy Co., Inc.*, 180 NLRB No. 59 (1969), the board included employees working in the furniture, television and lawnmower repair workrooms in a unit of warehouse employees at the employer's service building in Atlanta. The board there said:

> "[I]t is clear that the service building is essentially a place where goods are received, stored, processed, and then shipped to the retail stores or directly to customers, and that the employees located there are engaged in such activities or closely related work. Though some of the work of the workshop employees is concerned with repairing goods after they have reached the customer, others of the workshop employees, like the warehouse employees, process goods before they are delivered. For example, employees in the furniture shop may repair damaged furniture before sale or shipment, and the rug workshop performs cutting and installation. Also, as indicated, the Service Building Manager is the top supervisor for all service building workers, including those whom the Employer would exclude from the unit. The service building involves basically a single, separate operation, much like a single plant which is, under the Act, an inherently appropriate unit. In these circumstances, the fact that workshop employees are more skilled than warehousing employees no more suggests the inappropriateness of the building wide unit than does the fact that a plant may have employees of varying skills suggest the inappropriateness of a plantwide unit." (footnote omitted) 180 NLRB at p. 3 of slip opinion.

And in *H. P. Wasson & Co.*, 153 NLRB No. 1499 (1969), the board included a rug cutter in a unit of employees performing traditional warehouse functions.

The decision of the board in the case before us is totally inconsistent with those which it made in *Famous Barr, Macy* and *Wasson.*

Subsequent inconsistent decisions include *Sears, Roebuck & Co.*, 191 NLRB No. 84 (1971); *Sears, Roebuck & Co.*, 191 NLRB No. 85 (1971); and *Sears, Roebuck & Co.*, 182 NLRB No. 121 (1970).

In view of this total lack of consistency, we cannot enforce the board's order. *N.L.R.B. v. Metropolitan Insurance Co.*, 380 U.S. 438 (1965); *Westward-Ho, supra, Carnation Company v. N.L.R.B.*, 429 F.2d 1130 (9th Cir. 1970).

III. *Failure To Give Adequate Reasons For The Inconsistency.*

Finally, the board did not even bother to give reasons why this departure from its earlier decision involving the same facility and from its many decisions in other comparable situations might be appropriate. Although the board has substantial discretion, it cannot arbitrarily make inconsistent decisions without setting forth rational reasons and guidelines. A careful reading of the "Decision and Direction of Election" of the regional director, affirmed by the board, is conclusive of the proposition that the only attempted explanation of the departure from the holdings in the *Wasson, Famous Barr,* and *Macy* decisions is contained in one sentence:

> "Thus, in each of these cases, the petitioner [union] sought a unit which included the workroom employees."

It is inescapable that the board was saying, in effect: In the *Wasson, Famous Barr* and *Macy* cases the petitioning unions wanted the workroom employees included in the bargaining unit, so the board included them; but in the instant case, the petitioning unit wanted the workroom employees excluded from the unit, so the board excluded them.

Giving the petitioning union precisely what it wants just because it asks for it is the same as giving controlling weight to the extent the union has organized a group of employees. We have already noted that this is prohibited by Section 9(c)(5) of the Act. Hence the one sentence statement of reasons by the board fails utterly to distinguish its other inconsistent decisions.

The board's decision and order give controlling weight in determining the bargaining unit to the extent of unionization, in violation of Section 9(c)(5) of the Act. The board's decision and order are arbitrary and unreasonable in that they are totally inconsistent with prior, and subsequent, decisions of the board. Hence the petition to set aside the order is granted and the cross-application to enforce the order is denied.

BYRNE, Dissenting:

I respectfully dissent.

Contrary to my Brothers, I do not deem it "incumbent" upon the Board to explain its approval of the bargaining units different in scope at the same warehouse facility. As noted by the Fourth Circuit, "In many cases there is no 'right' unit. . . ." *NLRB v. Quaker City Life Insurance Co.*, 19 F.2d 690, 693 (4th Cir. 1963). Under such circumstances, the Board is not required by the Act "to choose the most appropriate unit, but only to choose an appropriate unit

within the range of several appropriate units in a given factual situation." *State Farm Mutual Automobile Insurance Co. v. NLRB,* 411 F.2d 356, 358 (7th Cir. 1969), cert. denied, 396 U.S. 832 (1969). Accord, *Gallenkamp Stores Co. v. NLRB,* 402 F.2d 525 (9th Cir. 1968); *NLRB v. Deutsch Co.,* 265 F.2d 473 (9th Cir. 1959), cert. denied, 361 U.S. 963 (1960). Here the Board was confronted by two unions, on separate occasions, seeking to represent different segments of the working population at May's warehouse facility. Local 986 petitioned for a comprehensive unit, thus leaving unresolved, until the petition two years later by Local 196, the appropriateness of alternative groupings. Merely because the Board sanctioned an overall bargaining unit at May's warehouse does not mean that such a unit is the only one which is appropriate. Indeed, that is the teaching of the three Board decisions relied upon by the majority to lend credence to the assertion of policy deviation. Actually, a close reading of these decisions reveals a "reaffirmation to" a long standing principle of labor law, rather than a "departure from" previous Board policy.

In *H. P. Wasson & Co.,* 153 NLRB 1499 (1965), the Company owned four retail stores and two warehouses. The Union sought a bargaining unit composed of employees working at the two warehouses, including a rug cutter and clerical employees. Excluded from the Union's proposed unit were the following employees: truckdrivers, carpenters, painters, electricians and appliance repairmen who were "housed" at the two warehouses. The Company opposed this proposed unit, arguing that only one which included "all employees in the stores and warehouses" could be deemed "appropriate." Although the Board agreed that the Company's suggested unit was appropriate, it maintained that its duty under the act was to

choose only an appropriate unit, not the *most* appropriate unit. Under the circumstances of that case, the Board was of the view that the unit sought by the Union was proper:

> "Accordingly, on the entire record, particularly the facts that the requested unit comprises all the Employer's separately located warehousing operations; that there is separate supervision and the lack of substantial interchange between the employees in the warehouse and those of other locations of the Employer; that there is no history of collective bargaining; and that no union requests a broader unit, we find . . . that a unit of employees in the two warehouses is appropriate." 153 NLRB at 1501.

Similarly, in *The May Department Stores dba Famous Barr Co.*, 176 NLRB No. 14 (1969), the Board was again confronted with a union attempting to organize warehouse employees. There, the Union sought to represent all the employees at the Company's warehouse service facility save for office clerical employees, guards and supervisors. Over the Company's objection, the Board found these employees to have a sufficient community of interest to constitute an appropriate bargaining unit:

> ". . . [I]t is well settled that there may be more than one way in which employees may be grouped for purposes of collective bargaining. (Footnote omitted). The fact that a given group of employees may have an identifiable community of interests separate and distinct from other employees of an employer does not mean that the various groups of employees do not also have a larger common community of interests. Indeed, Section 9(b) of the Act reflects this basic fact of industrial and mercantile life in establishing the presumptive appropriateness of an employer unit,

craft unit, plant unit, or subdivision thereof. *Quite obviously, the fact that a subdivision of a plant may be appropriate does not preclude a finding that such employees may also appropriately be included in one of the larger enumerated units.* We therefore reject the Employer's contention that our prior decisions preclude the establishment of the Facility-wide unit sought by the Petitioner." (Emphasis supplied).

Finally, in *R. H. Macy Co., Inc.,* 180 NLRB No. 59 (1969) the Company opposed a unit of all warehouse employees, truckdrivers and garagemen at its service building on the ground that it was not limited to employees engaged in warehousing and delivery functions. The Board again rejected an attempt by an employer to supplant one appropriate unit with another: ". . . the fact that workshop employees are more skilled than warehousing employees no more suggests the inappropriateness of the building-wide unit than does the fact that a plant may have employees of varying skills suggest the inappropriateness of a plantwide unit." In sum, in these decisions, *the Board was not articulating policy guidelines establishing a proper warehouse bargaining unit,* but was merely seeking to determine whether the units in question were appropriate.

The instant factual situation is remarkably similar to the one presented the court in *NLRB v. Morganton Full Fashioned Hosiery Co.,* 241 F. 2d 913 (4th Cir. 1957). There, the United Textile Workers of America was decertified, pursuant to a Board election, as the bargaining representative of all the employers' production and maintenance workers. Two years later, in 1955, the American Federation of Hosiery Workers was elected and duly certified as the bargaining representative of the employers' knitters, knitter-trainees and helpers. The employers refused to bargain with

this union, arguing that the limited scope of the bargaining unit represented Board approval of employee groupings to the extent of organization. Although the court condemned such a practice, it disagreed with the employers that it had been a controlling factor in the Board's determination:

> "The American Federation of Hosiery Workers, which applied to the Board in 1955 to certify the knitters as a separate bargaining unit, was not the same union which several years before had represented all the production employees and had been decertified in 1953; and it made no effort in 1955 to organize the entire body. . . . The record lacks the positive evidence, . . . that both the union and the Board chose the smaller bargaining unit only because organization of all production workers had failed." 241 F. 2d at 916.

As was true in *Morganton,* the case before us is free of any "positive evidence" that the Board's approval of the less encompassing unit was solely attributable to the extent of Union organization. Indeed, the majority point out that within the so-called "fragmented unit," there was "no overwhelming union sentiment." Accordingly, the only "compelling inference from the record" that I can make is that Local 196, some 24 months after another brotherhood had been rejected as the bargaining representative of all the employees of the facility, petitioned the Board to represent a cohesive, but less inclusive, group of workers employed at May's warehouse.

I would enforce the Board's order.

APPENDIX B

JUDGMENT

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 26,790

The May Department Stores Company, Plaintiff-Appellant, *v.* National Labor Relations Board, Defendant-Appellee.	Upon Petition to Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from The National Labor Relations Board and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the petition to set aside the order is granted and the cross-application to enforce the order is denied.

A true copy.

Attest:

WM. B. LUCK, *Clerk.*

By EMIL E. MELFI, *Chief Deputy.*

Filed and entered January 20, 1972.

ORDER

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 26,790

The May Department Stores Company,
Plaintiff-Appellant,

v.

National Labor Relations Board,
Defendant-Appellee.

Before WRIGHT and TRASK, Circuit Judges, and BYRNE, Sr., District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Filed March 20, 1972.

WM. B. LUCK,
Clerk.

APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 21-RC-11512

The May Department Stores Company,[1]

Employer.

and

New Furniture and Appliance Drivers, Warehousemen and Helpers Local 196, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,[2]

Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

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[1] The name of the Employer appears in the caption as amended at the hearing.

[2] The name of Petitioner appears in the caption as amended at the hearing.

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2 (6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[3]

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[3] Petitioner seeks a unit of all employees who perform typical warehouse duties employed at the Employer's service building located in Los Angeles, California. The Employer contends that such a unit is too narrow in scope and moves to dismiss the petition on the ground that the unit sought by Petitioner does not include employees working at nearby locations who are performing precisely the same functions and duties as the employees Petitioner seeks to represent, and on the further ground that the unit sought by Petitioner also precludes employees working in the same building who have the same supervision as the employees in the unit sought by Petitioner and who have a mutuality of interest concerning wages, hours, and conditions of employment with those employees whom Petitioner seeks to represent. There is no bargaining history for these employees.

The Employer, a New York corporation, is engaged in the retail sale of merchandise and operates 17 retail stores in the Southern California area and a service facility in Los Angeles, California, which is the subject of the instant proceeding. The Los Angeles service building complex, herein referred to as the warehouse, serves as both a warehouse and service facility and consists of four adjacent buildings, occupying the major portion of the block formed by Jefferson Boulevard and Grand Avenue, with a fifth and newer building located on the east side of Grand Avenue. At this warehouse, the Employer carries out a variety of operations, including merchandise receiving, proc-

All warehouse employees, including heads of stock and assistants to the furniture buyers, employed at

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essing, shipping, distribution, and clerical functions. In addition to these warehouse operations, there are several workrooms, a fur storage area, and a cafeteria at this facility.

A number of stipulations as to eligibility of certain persons were entered into by the parties. Thus, the following persons were stipulated to be supervisors within the meaning of Section 2(11) of the Act: Andrew Briggs, who is service department building superintendent, Floyd Gumpert, John McKinney, Claude Brooks, George Nelson, Luke Nestle, Frank Euler, Ernest Greer, Walter Tyler, Levi Ives, Merrill Byington, Charles Sheppard, Charles Harkins, Peter Sanchez, Ralph Wright, William Cox, Don Aoki, Ray Jollette, and Messrs. Starcer, Hoyes, Melnick, Evans, McFarlane, Segal, Bellow, DiFiore, and DeCaro. The following persons were stipulated not to be supervisors within the meaning of Section 2(11) of the Act: Messrs. Jullian, Navarette, Quion (or Quiaon), Arnold Hoffman, John DeSilva, Al Holtz, Louis Hazzlet, Frank Espinoza, Walter Sanchez, Kenneth Horn, Joe Downey, and Howard Carrol. The parties also stipulated that the invoice order checkers were office clerical employees who should be excluded from the appropriate unit, and that Beth Stith, who is Briggs' secretary, should be excluded from the unit. Finally, the parties stipulated that the cafeteria employees, the buyers' clericals, and the duplicating and mail girl in the buyers' clerical office should be excluded from the unit, and that Mrs. Downey should be included in the unit.

All operations at the warehouse are under the overall supervision of Briggs. Reporting to him are Managers Gumpert, Starcer, Ives, Sanchez, and McFarlane.

All shipping, receiving, checking, marking, and initial distribution employees in the warehouse work under the immediate supervision of either Shipping and Receiving Manager Byington or Checking, Marking, and Internal Distribution Manager Harkins, both of whom, in turn, report to Briggs.

All storage, internal movement, packing, and maintenance employees at the warehouse (which include the classifications of stockmen, warehousemen, packers, craters, porters, and freight elevator operators) are under the immediate supervision of General Stock Operations Manager Hoyes, or Furni-

the Employer's service building located at Jefferson Boulevard and Grand Avenue in Los Angeles, Cali-

Footnote 3—Continued.
ture Storage and Processing Manager Nestle, or Maintenance and Internal Movement Manager Tyler.

All administration of, and coordination of, materials movement employees at the warehouse (essentially record keeping and perpetual inventory control employees) are under the supervision of either Furniture Control Office Manager Brooks or General Control Office Manager McKinney.

The facility contains workrooms where products sold at the Employer's stores are made or serviced. Petitioner contends, contrary to the Employer, that employees working in all of these workrooms, except the furniture workroom, should be excluded from the unit because they do not perform typical warehouse functions. With regard to the employees working in the furniture workroom, Petitioner, in effect, takes no position as to whether or not they should be included in the unit.

Furniture workroom.—The employees in this workroom prepare for delivery all furniture that is to be delivered prior to shipment. In this regard, outside coverings and packings from the furniture are removed, and any preassembly work, such as the attachment of legs to tables and mirrors to bureau tops, is performed. With upholstered furniture, threads are snipped off, spots removed, and a protective cover is added. In the course of preparing the furniture for shipment, some repair or refinishing work may be done by the touchup men, spray painters, or cabinet makers. After the furniture is polished and covered, it is moved by these employees to a checkout area where it is assembled, after which it is checked by a unit employee who then moves it to a pickup area for delivery.

There are also four outside furniture repairmen who work on repairing and refinishing merchandise sold and already delivered to the customers. These employees drive panel trucks containing repair parts and tools. Although the Employer furnishes each employee with the truck and uniforms, each outside furniture repairman furnishes his own hand tools. These repairmen spend 90 percent of their time away from the warehouse working in customers' homes and traveling. They eat their lunch and take work breaks in the field.

Upholstery workroom.—Employees in this room recover upholstered furniture previously sold to and used by a customer

fornia; excluding all other employees, including workroom employees, office clerical employees, timekeeper,

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and which needs recovering. They also repair new furniture prior to shipment if its upholstery has been damaged in handling. With regard to upholstery work for a customer, the customer selects the fabric at one of the Employer's retail stores, and a copy of the sales check is forwarded to the warehouse. A stockman selects the roll of fabric involved and cuts off the number of yards requested, bundles it up, and identifies it with the customer's name and job number. It is then taken to the upholstery workroom, which is adjacent to the stock area. If the fabric is not in stock, it is ordered and upon receipt is brought to the workroom where it first goes to the cutters and sewers. The fabric is cut to the required pattern, and some preliminary sewing is completed. Then, reupholstery employees strip the furniture of its old coverings and apply new coverings. The remaining fabric is then used to make cushions, if they are required, and the piece of furniture is then assembled. After the reupholstery work has been completed, the furniture is loaded onto a flat bed truck by workroom employees and transported out of the workroom to the elevators.

Drapery workroom.—The employees in this workroom prepare custom draperies from customers' orders obtained at the Employer's retail stores. Drapery fabrics are stored in the warehouse, and, as with the cut order for upholstery fabric, a stockman cuts the requested amount of drapery fabric from a roll and delivers it to the workroom where it initially goes to the cutters who cut the fabric into the panel lengths that will be used for the final draperies. The material then goes to the sewers and tablers to make the hems, join the panels, and insert the pins. Finally, it is folded and wrapped and staged for its delivery date. After the draperies are prepared, these workroom employees take the wrapped and packed draperies to the United Parcel packing and pickup station. The draperies are installed either by an outside contractor or by the Employer's outside drapery installers. Like the outside furniture repairmen, the Employer supplies the installers' trucks and uniforms, but the installers furnish their own tools and equipment. Most of their worktime is spent away from the warehouse, and they take their lunch and work breaks at their own convenience.

Carpet workroom.—These employees prepare custom carpets

cashier, receptionist; assistant timekeeper and cashier or mail distribution girl, guards, and supervisors as defined in the Act.

Footnote 3—Continued.

to customers' orders and select and fill orders for precut rugs. If the order is for wall-to-wall carpeting, the carpet and padding are cut in accordance with the specifications provided by the salesman. Then the carpet and pad are rolled, wrapped, and marked for the contractor who performs the installation work. If the customer's order was for a precut rug, the workroom employees would fill the order and tag it with the delivery paper. If the rug is unwrapped, it is sent to the packing bench where it is packed and labeled and sent out on delivery.

Candy workroom.—The employees in this workroom make candy for sale at the retail stores. In addition, these employees prepare "gift baskets" (colorfully wrapped baskets containing the Employer's candy or liquor or gourmet foods) for sale at the Employer's stores. The raw materials for the candy are kept in the workroom kitchen. After the candy is manufactured, it is moved by stockmen into the adjacent stockroom. Employees in the workroom wear distinctive uniforms. The men wear white trousers and shirts; the women wear tan smocks. Both men and women wear hair nets if their hair is long.

Alterations workroom.—Employees in this workroom are tailors and sewing machine operators and are responsible for performing a craft function. They make alterations on men's clothing sold by the retail stores. No merchandise goes into stock; once the alterations are completed, the clothes are placed in a store cage and sent down the elevator to the loading docks where the cages are loaded onto trucks for delivery to the stores.

Fur storage operation.—There is one full-time employee in this department plus another employee who spends part of his time there depending upon the workload. The employees report to the men's alterations workroom. Upon a request by a customer to have a fur stored, the retail store will send the fur to the warehouse in the cages containing men's goods. The fur storage employee makes out a contract for the customer, describing the fur held in storage, and mails it to the customer. He also takes care of the billing to the customer, contacts the customer with respect to picking up the fur, and notifies the customer that the fur will be sold when rental charges are not

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the em-

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paid. The fur storage employee is also in contact with the fur department employees at the retail stores concerning information necessary for storage.

On August 10, 1967, the Acting Regional Director issued a Decision and Direction of Election in Case No. 21–RC–10457, directing an election in an overall unit of all employees, including those working in the workrooms, employed at the warehouse. In that Decision, the Acting Regional Director concluded that a unit confined to the warehouse was appropriate. In the instant case, as in the earlier proceedings, the Employer contends that any unit limited to the employees at this facility is not an appropriate unit and that a unit including the employees at the retail stores should be found appropriate. However, the record does not disclose that there has been any substantial change in the operation of the warehouse since issuance of that Decision and Direction of Election. Thus, the warehouse apparently remains geographically separated from each of the retail stores, there is separate supervision of warehouse employees, and there has been no showing that there is significant interchange and transfer of employees. In these circumstances, and in the absence of any bargaining history, I find, based upon the record in its entirety, that a unit confined to the warehouse employees working at the warehouse is appropriate. *Associated Dry Goods Corporation d/b/a J. W. Robinson Co.*, 153 NLRB 989, 992.

The Employer also contends that the unit sought by Petitioner is inappropriate because it does not include workroom employees, who were included in the unit found appropriate in the Decision and Direction of Election in Case No. 21–RC–10457. The Board has held that employees in upholstery and fur storage workrooms do not perform typically warehouse functions and, accordingly, has excluded these employees from a unit of warehouse employees. *A. Harris & Co.*, 116 NLRB 1628, 1633. Similarly, the Board has also excluded furniture workroom employees, carpet workroom employees, and drapery department employees from units of warehouse employees. *Associated Dry Goods Corporation*, 117 NLRB 1069; *May De-*

ployees in the unit found appropriate at the time and place set forth in the notice of election to be issued

Footnote 3—Continued.

partment Stores Company d/b/a Famous-Barr Company, 153 NLRB 341. In its brief, the Employer concedes that the Board traditionally excluded workroom employees from warehouse units but contends that the Board recently reversed this policy in *H. P. Wasson & Co.*, 153 NLRB 1499; *The May Department Stores Company, d/b/a Famous Barr Company*, 176 NLRB No. 14; and *R. H. Macy Co.*, 180 NLRB No. 59. Careful examination of these cases, however, discloses that they do not support the Employer's contention. Thus, in each of these cases, the petitioner sought a unit which included the workroom employees. Contrary to the Employer's contention, the Board did not reverse its traditional view that a unit of warehouse employees excluding workroom employees is appropriate in *The May Department Stores Company, d/b/a Famous Barr Company*, 176 NLRB No. 14, but, rather, the Board specifically pointed out in that decision, at page 5, that ". . . it is well settled that there may be more than one way in which employees may be grouped for purposes of collective bargaining. The fact that a given group of employees may have an identifiable community of interests separate and distinct from other employees of an employer does not mean that the various groups of employees do not also have a larger common community of interests." [Footnote omitted.] Conversely, it is well established that the Act does not compel labor organizations to seek representation in the most comprehensive grouping of employees which might be appropriate unless such a grouping constitutes the only appropriate unit. *H. P. Wasson & Co., supra*, at 1500. Accordingly, although an overall unit may be appropriate in the instant case, it is not the only appropriate unit, inasmuch as it is well settled that workroom employees do not perform typically warehouse functions and inasmuch as the Board has held that units of warehouse employees excluding those working in the workrooms are appropriate. In these circumstances, and based upon the record as a whole, I find that the unit sought by Petitioner is appropriate, and, therefore, I deny the Employer's motion to dismiss the petition and will exclude from the unit the employees working in the furniture workroom, candy workroom, drapery workroom, car-

subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were

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pet workroom, alterations workroom, fur storage workroom, and upholstery workroom.

The Employer further contends, contrary to Petitioner, that certain employees are plant clerical employees who should be included in the unit. These employees are classified as furniture delivery clericals, furniture adjustment clerks, furniture unit control clerks, general unit control clerks or unit control clerks (other than furniture), reorder clerks, general adjustment clerks or adjustment clerks (other than furniture), timekeeper, cashier, receptionist, and assistant timekeeper and cashier who apparently is also referred to as the mail distribution girl. In the Decision and Direction of Election in Case No. 21–RC–10457, the Acting Regional Director concluded that the furniture delivery clericals, furniture adjustment clerks, furniture unit control clerks, unit control clerks (other than furniture), and reorder clerks were office clerical employees. The record in the instant case discloses the duties and working conditions of these employees have not changed since the issuance of that Decision. Accordingly, I find, based upon the record in its entirety, that they are office clerical employees, and I shall exclude them from the unit.

The general adjustment clerks perform basically the same function as furniture adjustment clerks for nonfurniture items, i.e., they receive communications from customers and/or salesmen and arrange for merchandise exchanges, repairs, credits, and pickups of canceled merchandise orders. They record documents pertaining to the return of merchandise to stock and credits to customers. The majority of their work is spent at desks using phones and typewriters. In these circumstances, and inasmuch as their duties correspond to those performed by the furniture adjustment clerks, who have been found to be office clerical employees, I find that the general adjustment clerks are office clerical employees, and I shall exclude them from the unit herein found to be appropriate.

The *timekeeper* receives and checks timecards for all employees in the warehouse and records tardiness and absences on a time record for each employee. She also checks to see that

employed during the payroll period immediately preceding the date below, including employees who did

Footnote 3—Continued.

overtime claimed by employees has been approved. The records she prepares are used to determine the reliability of employees. She also handles credit union distributions, W–2 forms, and forms pertaining to employee benefits. So far as the record discloses, her duties have not changed since issuance of the prior Decision.

The *cashier* receives and distributes the payroll at the warehouse, collects C.O.D. cash, manages the petty cash fund, assists with the telephone, and may, on occasion, substitute for one of the other employees in sorting the mail or in recording into the various records and department papers. She also prepares bank statements and deposit slips. As with the timekeeper, the cashier's duties have not changed since issuance of the prior Decision.

The *receptionist* has her desk on the fifth floor of the warehouse near the passenger elevator. Her duties consist mainly of paging personnel in the warehouse; however, she also maintains some clerical records that reflect United Parcel delivery quantities.

Finally, there is a female employee who acts as an *assistant timekeeper and cashier* and performs *mail distribution duties.* At times she also pages personnel. This employee assists in maintaining an attendance file and is involved in the arrangement of employee vacation schedules. She also maintains a supply room for all the people in the warehouse. The supply room contains forms, pencils, pens, crayons, staples, envelopes, etc., and the warehouse personnel must communicate with her prior to the removal of any articles from the supply room.

The Employer contends that these four employees are plant clerical employees, and the timekeeper, cashier, and mail distribution girl were held to be plant clerical employees in the Decision in Case No. 21–RC–10457. However, in that case, an election was directed in a unit of all employees at the facility, whereas in the instant case I am directing an election in a unit confined to employees performing typically warehouse functions. Consequently, the scope of the unit in the instant proceeding is more limited. These four clerical employees are under the supervision of Personnel Director of the Service Building McFarlane. They enjoy the same benefits as other employees at

not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are

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the facility. Their duties are related to both unit and nonunit employees. In performing these duties, they have daily contact with a much larger group of employees than Petitioner seeks to represent. In these circumstances, and in the absence of a showing that these four clericals have interests which are peculiarly allied with those of unit employees and which are different from those of nonunit employees, I find that the timekeeper, cashier, receptionist, and assistant timekeeper and cashier or mail distribution girl do not share a community of interest with unit employees. Accordingly, I shall exclude them from the unit.

Heads of Stock and Assistants to the Furniture Buyers: These employees were included within the unit found appropriate in Case No. 21–RC–10457. There is no evidence that their duties have changed since the hearing in that case. The Employer, contrary to Petitioner, would include these classifications in the unit.

These employees work in the room where the furniture unit control employees, furniture adjustment clerks, and furniture delivery clerks are employed. The heads of stock have duties similar to the assistants to the furniture buyers, and both groups of employees report to the funiture buyers, who also have desks in this room. Although delivery is not their prime responsibility, they do work with both stock records and the actual stock for purposes of scheduling deliveries, and in this regard they may have occasion to speak with customers and manufacturers concerning a particular delivery. Their other duties consist of inspecting furniture as to quality as well as checking for damage in the course of delivery. They also consult with furniture workroom employees concerning the feasibility of repairing furniture and inspect furniture in order to determine what pieces should be returned to vendors.

Although the majority of their time is spent at the warehouse, they do on occasion travel to the Employer's various retail stores for special sales. They actively participate in warehouse sales and confer with stockmen as to the merchandise to be placed on sale. The duties of these employees appear to be that of expeditors—coordinators as a liaison between the furniture buyers, store personnel, and warehousing operation. In es-

employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who

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Footnote 3—Continued.

sence, these employees have more time to spend at the operational level of the warehouse than do the buyers, and their duties are to provide the buyer with a ready source of information concerning both the quantity and quality of merchandise and the results of stockmen's findings relative to packing and shipping problems. Finally, these employees participate with stock and receiving personnel on quality committees formed on occasion to check incoming shipments of merchandise and to observe returns when there have been customer complaints. As with the other employees previously discussed, these employees punch a timeclock, work a 40-hour, 5-day week, receive premium pay for all overtime worked, and have essentially the same conditions of employment and fringe benefits as other employees working at the warehouse. Based on the above, as well as the record testimony that the duties of these employees have not changed since the prior hearing, I hold that these employees perform functions that are directly related to the work being engaged in by unit personnel and should be included in the unit.

Inasmuch as the record is insufficient to make a determination as to whether Lionel Trouillier is a supervisor within the meaning of Section 2(11) of the Act and does not contain sufficient evidence to determine the eligibility of Head of Claims Joe Downey, I shall permit them to vote subject to challenge.

There are approximately 200 employees in the unit.

have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[4] Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by New Furniture and Appliance Drivers, Warehousemen and Helpers Local 196, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Dated January 30, 1970, at Los Angeles, Calif.

RALPH E. KENNEDY,
Regional Director, Region 21.

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[4] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. (*Accordingly, two copies should be submitted.*) In order to be timely filed, such a list must be received in the Regional Office, 849 South Broadway, Los Angeles, California 90014, on or before February 6, 1970. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 21-CA-9174

The May Department Stores Company and New Furniture & Appliance Drivers, Warehousemen & Helpers Local 196, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

DECISION AND ORDER

Upon a charge filed by New Furniture & Appliance Drivers, Warehousemen & Helpers Local 196, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued a complaint dated June 19, 1970, against The May Department Stores Company, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

The complaint alleges, in substance, that on or about March 27, 1970, the Union was duly certified as the exclusive bargaining representative of the Re-

spondent's employees in an appropriate unit, and that, on or about April 16, 1970, and thereafter, the Respondent refused to recognize or bargain with the Union as such exclusive bargaining representative, although the Union requested the Respondent to do so. On July 20, 1970, Respondent filed its answer to the complaint, and on July 23, 1970, an amendment to said answer, in which it admitted in part and denied in part the allegations contained therein, and requested that the complaint be dismissed.

On July 27, 1970, the General Counsel filed with the Board a Motion for Summary Judgment, asserting that there were no issues of fact or law which had not already been litigated before and determined by the Board in a prior representation case,[1] and requesting an appropriate order remedying the violations as alleged in the complaint. Thereafter, on July 28, 1970, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Pursuant thereto, Respondent filed a Response to the Notice to Show Cause with a supporting affidavit.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

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[1] Official notice is taken of the record in the representation proceeding, Case 21—RC—11512, as the term "record" is defined in Sections 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F. 2d 683 (C.A. 4, 1968); *Golden Age Beverage Company*, 167 NLRB 151; *Intertype Co.* v. *Penello*, 269 F. Supp. 573 (D.C. Va., 1967); *Intertype Company* v. *N.L.R.B.*, 401 F. 2d 41 (C.A. 4, 1968); *Follett Corporation, et al.*, 164 NLRB 378, enfd. 397 F. 2d 91 (C.A. 7, 1968); Section 9(d) of the National Labor Relations Act.

Upon the entire record in this case, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

The record establishes that pursuant to a petition filed by the Union in the above-mentioned representation case, and following a hearing before a Hearing Officer of the Board, the Regional Director, on January 30, 1970, issued his Decision and Direction of Election, in which he found appropriate a unit of warehouse employees, as more fully described hereinafter. Thereafter, the Respondent filed with the Board a timely Request for Review of the Regional Director's Decision, and a Motion to Augment said request, in which it raised various issues concerning the scope and composition of the unit which the Regional Director found appropriate. By telegram dated February 26, 1970, the Board denied the Request for Review and the Motion to Augment for the reason that they raised no substantial issues warranting review, except as to the unit placement of the timekeeper, cashier, receptionist, and assistant timekeeper/cashier, which issues, the Board stated, were best resolved by the challenge procedure.

On February 27, 1970, an election was held, in which a majority of the valid ballots were cast for the Union.[2] The Union was certified on March 27, 1970.

By letter dated April 16, 1970, the Union requested the Respondent to bargain collectively. Respondent,

[2] Following the election, certain challenges were resolved by stipulation of the parties. As the Petitioner's majority was established following the count of such challenged ballots, the remaining challenges and the Petitioner's objections were not resolved.

by letter dated April 20, 1970, refused to bargain collectively with the Union, and on April 22, 1970, the Union filed the charge upon which these proceedings are predicated.[3] In its Response to the Notice to Show Cause, Respondent predicates its refusal to bargain solely upon its contention that the certified unit is inappropriate. Of the various unit issues raised in its Request for Review, the Respondent's response raises specifically only the issues concerning the exclusion of the workroom employees, timekeeper, and cashier, contending that by excluding them from the unit the Board erred as a matter of law.

It is well settled that in the absence of newly discovered or previously unavailable evidence, a respondent in a Section 8(a)(5) proceeding is not entitled to relitigate issues which were or could have been raised in the prior representation proceeding.[4] As all contentions now made were raised at the earlier hearing in the representation case, and were considered and, except as noted, rejected by the Board in its denial of review,[5] and as all factual allegations

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[3] In its answer to the complaint Respondent raises a question as to the filing and service of the charge. Timely filing and service of the charge is established by unchallenged documentary evidence attached to the Motion for Summary Judgment.

[4] *Pittsburgh Plate Glass Company* v. *N.L.R.B.*, 313 U.S. 146; *The Sheffield Corporation*, 163 NLRB 180; *Collins & Aikman Corporation*, 160 NLRB 1750.

[5] As noted the Board, while denying the Respondent's Request for Review with respect to the basic appropriateness of the warehouse unit, left for subsequent resolution through challenge procedures certain unit placement issues. Among them were the placement of the timekeeper and the cashier, whose exclusion from the certified unit the Respondent now relies on as part of its defense to the complaint. It is not clear from the record whether the timekeeper and the cashier cast chal-

of the complaint are admitted by Respondent's answer to the complaint or stand admitted by the failure of Respondent to controvert the averments of the General Counsel's motion, there are no matters in issue requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment is granted.

On the basis of the record before it, the Board makes the following:

FINDINGS OF FACTS

I

THE BUSINESS OF THE RESPONDENT

Respondent, a corporation with a business and warehouse in Los Angeles, California, is engaged in the operation of a nationwide retail department store

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lenged ballots; in any event, the question of their unit placement has not yet been resolved.

The fact that such question has not yet been resolved is not, however, a valid defense to the complaint. It is clear that however that question might ultimately be resolved, its resolution cannot affect either the basic appropriateness of the certified warehouse unit, the Union's majority therein, or the ability of the parties to bargain in the certified warehouse unit. See *MarSalle, Inc.*, 173 NLRB No. 69 (second through fifth paragraphs of the section of the TXD entitled "Ruling on Motion for Summary Judgment"); *Houston Chronicle Publishing Company*, 130 NLRB 1243, 1245–46. Moreover, as the Respondent did not request review of the Regional Director's actions with respect to the unresolved issues, it is, for the reasons stated in *MarSalle, Inc., supra*, precluded in this proceeding from defending its refusal to bargain on the ground that those employees were improperly excluded from the unit. This does not, however, preclude bargaining concerning their unit placement or, after compliance with our order herein, filing a petition seeking to resolve that issue, pursuant to Sec. 102.60(b) of the Board's Rules aand Regulations.

enterprise. During the course and conduct of its business operations during the calendar year 1969, a representative period, the Respondent purchased and received goods and materials valued in excess of $50,000 directly from outside the State of California. During the same period of time, the Respondent sold products valued in excess of $500,000. We find that Respondent is, and has been at all times material hereto, an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II

THE LABOR ORGANIZATION INVOLVED

New Furniture & Appliance Drivers, Warehousemen & Helpers Local 196, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

III

THE UNFAIR LABOR PRACTICES

A. THE REPRESENTATION PROCEEDINGS

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All warehouse employees, including heads of stock and assistants to the furniture buyers, employed at the Respondent's service building located at Jefferson Boulevard and Grand Avenue in Los Angeles, California; excluding all other employees, including workroom employees, office

clerical employees, timekeeper, cashier, receptionist, assistant timekeeper and cashier or mail distribution girl, guards, and supervisors as defined in the Act.

2. The certification

On or about February 27, 1970, a majority of the employees of Respondent in said unit, in an election by secret ballot conducted under the supervision of the Regional Director for Region 21, selected the Union as their representative for the purpose of collective bargaining with Respondent, and on or about March 27, 1970, the Regional Director for Region 21 certified the Union as the collective-bargaining representative of the employees in said unit, and the Union continues to be such representative.

B. THE REQUEST TO BARGAIN AND THE RESPONDENT'S REFUSAL

Commencing on or about April 16, 1970, and continuing to date, the Union has been requesting the Respondent to bargain collectively with it with respect to wages, hours, and working conditions of the employees in the appropriate unit. At all times since on or about April 20, 1970, Respondent admittedly has refused to recognize and bargain collectively with the Union as exclusive collective-bargaining representatives of all employees in said unit.

Accordingly, we find that the Respondent has, since on or about April 20, 1970, refused to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV

THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F. 2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F. 2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The May Department Stores Company is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. New Furniture & Appliance Drivers, Warehousemen & Helpers Local 196, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehouse employees, including heads of stock and assistants to the furniture buyers, employed at the Respondent's service building located at Jefferson Boulevard and Grand Avenue in Los Angeles, California; excluding all other employees, including workroom employees, office clerical employees, timekeeper, cashier, receptionist, assistant timekeeper and cashier or mail distribution girl, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 27, 1970, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 20, 1970, and at all times thereafter, to bargain with the representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby engaged in and is

engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The May Department Stores Company, Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment with New Furniture & Appliance Drivers, Warehousemen & Helpers Local 196, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All warehouse employees, including heads of stock and assistants to the furniture buyers, employed at the Respondent's service building located at Jefferson Boulevard and Grand Avenue in Los Angeles, California; excluding all other employees, including workroom employees, office clerical employees, timekeeper, cashier, receptionist, assistant timekeeper and cashier or mail distribution girl, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its service building located at Jefferson Boulevard and Grand Avenue, in Los Angeles, California, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 21, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated: Washington, D.C., October 27, 1970.

JOHN H. FANNING,
GERALD A. BROWN,
HOWARD JENKINS, JR.,

Members.

NATIONAL LABOR RELATIONS BOARD.

[SEAL]

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[6] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of this National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Notice to Employees

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AN AGENCY OF THE UNITED STATES GOVERNMENT

We will not refuse to bargain collectively with NEW FURNITURE & APPLIANCE DRIVERS, WAREHOUSEMEN & HELPERS LOCAL 196, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All warehouse employees, including heads of stock and assistants to the furniture buyers, employed at the Respondent's service building located at Jefferson Boulevard and Grand Avenue in Los Angeles, California; excluding all other employees, including workroom employees, office clerical employees, timekeeper, cashier, receptionist, assistant timekeeper and cashier or mail distribution girl, guards, and supervisors as defined in the Act.

THE MAY DEPARTMENT STORES COMPANY,
(*Employer*).

Dated ---------- By ----------
(*Representative*) (*Title*)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 849 South Broadway, Eastern Columbia Building, Los Angeles, Calif. 90014, Telephone 213–688–5200.

APPENDIX D

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et. seq.*), are as follows:

* * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages,

hours of employment, or other conditions of employment:

* * * * * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1646

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE MAY DEPARTMENT STORES COMPANY,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

I.

Introduction.

Petitioner seeks review of the judgment below which set aside an order of the National Labor Relations Board (sometimes referred to herein as the "Board") which held that Respondent herein, The May Department Stores Company (sometimes referred to herein as "May"), violated Section 8(a)(5) of the National Labor Relations Act by refusing to bargain with Teamsters Local 196 after the Union received a majority of votes cast in a representation election held at May's service facility in downtown Los Angeles.

Under the heading "Reasons For Granting The Writ", Petitioner has grossly mischaracterized the holding of the court below and using this mischaracterization as a point of departure have drafted their state-

ment of Questions Presented so as to include issues which were not raised or decided by the court below.

Even accepting Petitioner's characterization of the holding below and the Questions Presented Petitioner has failed to show that the Questions Presented meet the standards for this Court's exercise of its certiorari jurisdiction as stated in Rule 19.

II.

Counterstatement of Questions Presented.

Should this court review the decision of the Court of Appeals which set aside an order of the National Labor Relations Board requiring Respondent to bargain with a labor organization in a bargaining unit where the decision of Petitioner establishing the bargaining unit was:

1. Contrary to and inconsistent with two prior decisions of Petitioner holding a much larger bargaining unit appropriate;

2. Contrary to and inconsistent with other prior decisions of Petitioner holding much larger bargaining units appropriate under the same facts and circumstances as were present in the instant case;

and where the Petitioner failed to articulate reasons for its inconsistent decision contrary to the mandate of this court to give such reasons set forth in *NLRB V. Metropolitan Life Insurance Company*, 380 U.S. 438 (1965).

III.

Reasons for Denying the Writ.

A. Petitioner Has Incorrectly Characterized the Holding of the Court of Appeals.

Petitioner states:

> "The court of appeals held that Section 9(c)(5) of the National Labor Relations Act prohibits the Board, in choosing between two units for collective bargaining purposes, each of which would be appropriate without regard to the extent of union organization, from selecting the unit requested by the union." (Petition, p. 7)

The Court of Appeals, however, expressly stated both the substance of and reasons for its holding as follows:

> "Because the board gave controlling weight in determining the bargaining unit to the extent of unionization, in violation of Section 9(c)(5) of the Act; and because the board failed to distinguish its decision in this case from its many inconsistent decisions in cases involving substantially identical fact situations, we grant the petition to set aside the order and deny the cross-application for enforcement." (Petitioner's Appendix A, p. 2a)

Thus, contrary to Petitioner's position, the Court of Appeals did *not* determine that Section 9(c)(5) of the Act prohibits the Board from selecting one of two appropriate units when that unit is requested by the Union. The Court of Appeals held only that in this particular case the decision of the Regional Director is conclusive of the proposition that he and hence the Board gave controlling weight to the degree of unionization in determining the appropriate unit in express

violation of the terms of 9(c)(5) of the Act; and that when the Board decides a case in a manner inconsistent with its prior holdings it must set forth the reasons for its decision.

B. The Decision of the Court of Appeals Is Not in Conflict With the Decision in Puritan Sportswear.

Petitioner asserts that the Court of Appeals decision conflicts with that in *National Labor Relations Board v. Puritan Sportswear Corp.*, 385 F.2d 142 (3rd Cir. 1967). In that case the Court of Appeals upheld the Board's determination that a smaller unit was appropriate where three years earlier the Board had certified a larger unit and the employees had rejected the union. The court held that both units were appropriate and that the Board had not violated Section 9 (c)(5) of the Act because "relevant and significant factors in addition to 'the extent to which the employees have organized' underlay and supported the Board's decision." *Id.* at 143.

The Court of Appeals' decision in the instant case is distinguishable from the decision in *Puritan Sportswear* in several respects. (1) In the instant case the Court of Appeals held that the decision of the Board did contravene Section 9(c)(5) of the Act, while in *Puritan Sportswear* the Court of Appeals held the decision of the Board did not contravene Section 9(c)(5) of the Act. (2) In the instant case the Court of Appeals found that the Board had given *no reason* for the change in the designation in the bargaining unit, while in *Puritan Sportswear* the Court of Appeals found there were "relevant and significant factors" which supported the Board's decision. (3) The Court of Appeals in the instant case found the Board's decision to

be in direct conflict with *other decisions* of the Board involving other employers on identical fact situations without any explanation, while the Court of Appeals in *Puritan Sportswear* made no such finding. (4) The Court of Appeals in the instant case did not hold that both units selected by the Board were appropriate units, while the Court of Appeals in *Puritan Sportswear* did so hold.

C. The Decision of the Court of Appeals Was Consistent With Decision of This Court in Metropolitan Life.

The decision of the Court of Appeals is consistent with this court's opinion in *NLRB v. Metropolitan Life Insurance Company,* 380 U.S. 438 (1965). In that case, Justice Goldberg speaking for eight members of the Court held that the Board must articulate its reasons for inconsistent decisions in order to facilitate judicial review.

The *Metropolitan Life* case involved a Court of Appeals decision which refused to enforce a Board order requiring the employer to bargain with a Union after the employer's objection to the appropriateness of the unit, by means of a refusal to bargain with the Union after certification by the Board was disallowed by the Board and the employer was found guilty of an unfair labor practice.

The United States Supreme Court remanded the case to the Board for further proceedings because of the Board's failure to set forth the basis for its decision. The Court held:

> "On the other hand, due to the Board's lack of articulated reasons for the decisions in and distinctions among these cases [footnote omitted], the Board's action here cannot be properly re-

viewed. When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' [Footnote omitted.] Phelps Dodge Corp. v. Labor Board, 313 US 177, 197, 85 L ed 1271, 1284, 61 S Ct 845, 133 ALR 1217. See Burlington Truck Lines v. United States, 371 US 156, 167-169, 9 L ed 2d 207, 215, 216, 83 S Ct 239; Interstate Commerce Comm'n v. J-T Transport Co., 368 US 81, 93, 7 L ed 2d 147, 156, 82 S Ct 204. Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency actions. . . .' Burlington Truck Lines v. United States, supra, 371 US at 168, 9 L ed 2d at 216; see Securities & Exchange Comm'n v. Chenery Corp., 332 US 194, 196, 91 L ed 1995, 1999, 67 S Ct 1575. For reviewing courts to substitute counsel's rationale of their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' Securities & Exchange Comm'n v. Chenery Corp., supra, 332 US at 196, 91 L ed at 1999." *NLRB v. Metropolitan Life Insurance Company*, 380 U.S. 438, 442-444.

Thus, in refusing to enforce the Board's order because the Board failed to set forth the *reasons* for its inconsistent holding, the Court of Appeals in the case at bar followed the mandate of the United States Supreme Court in *Metropolitan Life*.

The Supreme Court in *Metropolitan Life* recognized that "courts may not accept appellate counsel's post hoc rationalizations for agency actions." *Id.* at 444.

The Court of Appeals in the instant case also recognized this rule when it stated, "Counsel's after-the-fact attempts to explain the record are inadequate." (Petitioner's Appendix A, page 5a). Thus, the attempts of Petitioner's counsel to rationalize the Board's decision in his brief to the Court of Appeals and to this Court come too late to be considered as grounds for upholding the Board's action. The Board's decision must stand or fall on the basis of its own contents.

D. The Board's Decision Was Wholly Inconsistent With Its Prior Decisions in the Instant Case and in Other Cases.

The basic questions decided by the Regional Director of Region 21 of the Board and affirmed by the order of the Board was whether or not certain workroom employees employed in Petitioner's service building should be included in a bargaining unit of other employees working on the same floors in the same building.

This basic question was well settled by the Board in three decisions involving retail department store service buildings under facts and circumstances nearly identical to those of the instant case. In *H. P. Wasson & Co.*, 153 NLRB No. 1499 (1965), Respondent Board

included a rug cutter in a unit of employees performing traditional warehouse functions.

In *The May Department Stores Company d.b.a. Famous Barr Company,* 176 NLRB No. 14 (1969) the Board held appropriate a bargaining unit which included all employees employed at the Petitioner's Spring Avenue facility in St. Louis, including approximately 225 employees who performed traditional warehouse functions and approximately 90 employees employed in the furniture, carpet, appliance, and radio and television workrooms and in the fur storage vault.

Finally in *R. H. Macy Co., Inc.*, 180 NLRB No. 59 (1969), the Board included employees employed in the employer's furniture, television, and lawnmower repair workrooms in a unit of warehouse employees at the employer's Atlanta Service Building. In so holding, the Board said:

> "It is clear that the service building is essentially a place where goods are received, stored, processed, and then shipped to the retail stores or directly to customers, and that the employees located there are engaged in such activities or closely related work. Though some of the work of the workshop employees is concerned with repairing goods after they have reached the customer, others of the workshop employees, like the warehouse employees, process goods before they are delivered. For example, employees in the furniture shop may repair damaged furniture before sale or shipment, and the rug workshop performs cutting and installation. Also, as indicated, the Service Building Manager is the top supervisor for all service building workers, including those whom the Employer would exclude from

> the unit. In these circumstances, the fact that workshop employees are more skilled than warehousing employees no more suggests the inappropriateness of the building-wide unit than does the fact that a plant may have employees of varying skills suggest the inappropriateness of a plant-wide unit."

A comparison of the facts present in the *Famous Barr, Macy* and *Wasson* decisions with those present in the instant case reveal that there is an even closer community of interest between the employees included and those excluded in the instant case than was true in the cited cases. Yet the decision of the Board in the instant case is contrary to and totally inconsistent with the decisions in *Famous Barr, Macy* and *Wasson.*

In addition, the Petitioner's decision was a complete departure from its prior decision involving the same facility. In this connection upon a petition filed by Miscellaneous Warehousemen, Drivers & Helpers Local 986, William G. Wilkerson, Acting Regional Director, issued his Decision and Direction of Election on August 10, 1967, in Case No. 21-RC-10457 in which he held the following employees of Respondent herein constituted a unit appropriate for purposes of collective bargaining:

> "All employees employed at the employer's Service Building located in Los Angeles, California; excluding all office clerical employees, guards and supervisors as defined in the act."

Implicit in this decision was the inclusion of all workroom employees in the bargaining unit. In addition, the acting Regional Director (at page 46 of his decision)

expressly included the timekeeper, cashier and mail distribution girl.

By a Decision and Direction of Election issued January 30, 1970, Ralph E. Kennedy, the Regional Director of Region 21 of Petitioner, held that the following employees of Respondent herein constituted a unit appropriate for purposes of collective bargaining:

> "All warehouse employees, including heads of stock and assistants to the furniture buyers, employed at the Employer's service building located at Jefferson Boulevard and Grand Avenue in Los Angeles, California; excluding all other employees, including workroom employees, office clerical employees, timekeeper, cashier, receptionist, assistant timekeeper and cashier or mail distribution girl, guards and supervisor as defined in the act."

It could not be plainer that the two decisions involving Respondent's Los Angeles, California, Service Building are completely inconsistent in that the prior decisions *included* the workroom employees, timekeeper, cashier and mail distribution girl, while the later decision *excluded* them.

E. The Board Failed to Give Adequate Reasons for the Inconsistency.

The Court of Appeals held that the Board failed to give an adequate explanation for its inconsistent opinion. In this connection the Court stated:

> "A careful reading of the 'Decision and Direction of Election' of the regional director, affirmed by the board, is conclusive of the proposition that the only attempted explanation of the departure

from the holdings in the *Wasson, Famous Barr* and *Macy* decisions is contained in one sentence:

> 'Thus, in each of these cases, the petitioner [Union] sought a unit which included the workroom employees.'
>
> * * *
>
> "Hence the one sentence statement of reasons by the board fails utterly to distinguish its other inconsistent decisions." (Petitioner's Appendix A, pp. 7a, 8a).

Furthermore the Court of Appeals soundly based its decision upon the failure of the Petitioner to adequately explain its two inconsistent decisions involving Respondent's service building. In this connection, the Court stated:

> "Although we do not contest the board's counsel's general proposition that more than one unit may be appropriate at any facility [*See State Farm Mutual Automobile Insurance Co. v. N.L.R.B.*, 411 F.2d 356 (7th Cir. 1969), cert. denied 396 U.S. 832 (1969)], we are not convinced that merely because the board, at the urging of the union, has made two conflicting determinations this shows conclusively that there are two appropriate units in one facility.
>
> There was no significant change between 1967 and 1970 at the May service facility. In view of the fact that the union sought a facility-wide uni', lost the election, and then sought a fragmented unit, we feel that it is incumbent upon the board at the very least to confront the inconsistency between its two rulings and give adequate reasons why it finds two different appropriate units within

the same facility. Counsel's after-the-fact attempts to explain the record are inadequate." (Petitioner's Appendix A, p. 5a).

F. The Court of Appeals Decision Did Not Restrict the Board's Freedom to Choose an Appropriate Unit.

Petitioner asserts that:

> "The question whether Section 9(c)(5) prohibits the Board, in choosing between units, each of which would be appropriate without regard to the extent of union organization, from selecting the unit requested by the union is an important one in the administration of the Act." (Petition, p. 12).

While this may well be true, it was neither an issue nor a holding in the instant case.

The Court of Appeals clearly stated that its refusal to enforce the Board's order was based on inconsistencies of the Board's order with prior Board determinations on substantially identical fact situations, and a failure by the Board to explain the reasons for that inconsistency.

As has been demonstrated above, prior decisions of this Court require denial of enforcement of Board orders when those two circumstances are present in a given case. The decision of the Court below in no way restricts or limits the ability of the Petitioner to find more than one unit appropriate for purposes of collective bargaining when the petitioner properly explains the reasons for its decision.

Conclusion.

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: July 20, 1972.

Respectfully submitted,

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